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9 UNITED STATES BANKRUPTCY COURT

10 FOR THE DISTRICT OF OREGON

11 In Re: ) Bankruptcy Case  
12 CYNTHIA LEE ODLIN, ) No. 07-62298-fra13  
13 Debtor. ) MEMORANDUM OPINION  
14 \_\_\_\_\_)

15 Debtor filed an amended post-confirmation chapter 13 plan,  
16 proposing to surrender a vehicle securing a claim by Capital Financial  
17 Services, LLC (hereinafter "Capital Financial") and discontinuing  
18 payments on Capital Financial's secured claim. For the reasons that  
19 follow, I find that the amended chapter 13 plan was not proposed in good  
faith and the plan as filed cannot be confirmed.

20 I. FACTS

21 Debtor purchased a 2005 Pontiac from Butler Automotive. The  
22 purchase was financed by Capital Financial, which acquired the note and  
23 security interest from Butler.

24 Debtor filed her chapter 13 petition for relief on August 13,  
25 2007. Her original plan proposed to pay \$6,000 to Capital Financial, with  
26 interest at 9% per annum, at the rate of \$100/month for 24 months, and

1 \$200/month thereafter for the duration of the plan. The order confirming  
2 the plan amended the amount to be paid to \$11,735, and provided for  
3 payments of \$100 per month for 24 months, and \$400 per month thereafter.  
4 On March 19, 2008, Debtor proposed a post-confirmation modification of  
5 the plan which sought to modify the treatment of Capital Financial's  
6 claim by providing for equal monthly payments of \$180 per month. Capital  
7 Financial objected, asserting that \$180 per month was insufficient to  
8 satisfy its claim. The dispute was settled and a stipulated order was  
9 submitted providing for \$100 per month payments, increasing to "all  
10 available funds after attorney fees paid."

11 On April 29, 2010, Debtor filed yet another post-confirmation  
12 amended plan, proposing to surrender the 2005 Pontiac Sunfire to Capital  
13 Financial in full satisfaction of the creditor's secured claim. Capital  
14 Financial has objected to confirmation of the April 29 amended plan.

15 At the hearing on August 10, Capital Financial presented  
16 evidence that the vehicle had, since it was acquired by the Debtor,  
17 suffered significant damage over much of its exterior. The interior was  
18 described as "trashed." Of particular concern was the fact that the  
19 car's digital dashboard was not functional, making it impossible to  
20 ascertain the car's mileage. In the view of the creditor's witness, the  
21 vehicle would not bring more than \$500 if repossessed and sold. There  
22 was also evidence that the Debtor had allowed the insurance required by  
23 the contract to lapse. No evidence was presented explaining what caused  
24 the damage.

25 After testimony was closed at the August 10 hearing, the  
26 parties presented their arguments. Capital Financial raised the issue of

1 good faith, which was objected to by Debtor's counsel on the ground that  
2 it had not been raised prior to the hearing. Debtor was given two weeks  
3 to brief the issue of good faith and any additional issues and Capital  
4 Financial was given one week to file a response.

5 **II. DISCUSSION**

6 Modification of a chapter 13 plan of reorganization after  
7 confirmation is governed by 11 U.S.C. § 1329<sup>1</sup>, which provides in relevant  
8 part:

9 (a) At any time after confirmation of the plan but  
10 before completion of payments under such plan, the  
11 plan may be modified, upon request of the debtor, the  
trustee, or the holder of an allowed unsecured claim,  
to -

12 (1) increase or reduce the amount of payments on  
claims of a particular class provided for by the  
plan;  
13 (2) extend or reduce the time for such payments;  
14 (3) alter the amount of the distribution to a  
creditor whose claim is provided for by the plan  
to the extent necessary to take account of any  
payment of such claim other than under the plan;  
\* \* \*

16 (b) (1) Sections 1322(a), 1322(b), and 1323(c) of  
this title and the requirements of section  
1325(a) of this title apply to any modification  
under subsection (a) of this section.  
18 (2) The plan as modified becomes the plan  
unless, after notice and a hearing, such  
19 modification is disapproved.  
\* \* \*

21 Section 1322 governs the contents of a plan and provides  
22 mandatory requirements in subsection (a) and allowable discretionary  
23 actions in subsection (b). Section 1325(a) provides requirements for  
24 confirmation of a plan of reorganization and at subsection (a)(3)

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26 <sup>1</sup> Hereinafter, reference to § or Code § shall refer to the  
Bankruptcy Code, 11 U.S.C. §§ 101 to 1532, unless otherwise specified.

1 requires that "the plan has been proposed in good faith and not by any  
2 means forbidden by law."

3 There are two lines of cases dealing with the issue of plan  
4 modification which provides for post-confirmation surrender of collateral  
5 and replacement of the formerly secured claim with a possible unsecured  
6 deficiency claim. One line of cases is exemplified by Chrysler Financial  
7 Corp. v. Nolan, 232 F.3d 528 (6th Cir. 2000). That court held that: (1)  
8 § 1329(a) does not expressly allow the debtor to alter, reduce, or  
9 reclassify a previously allowed secured claim; (2) the proposed  
10 modification would violate § 1325(a)(5)(B), which mandates that a secured  
11 claim is fixed and must be paid in full once it is allowed; (3) the  
12 proposed modification would contravene § 1327(a)[providing for the  
13 binding effect of a plan] by giving the debtor the option of shifting the  
14 burden of depreciation to the secured creditor; and (4) if such an  
15 interpretation were approved, it would put the secured creditor in the  
16 inequitable position where it could not propose a modification if its  
17 collateral appreciated, but debtor could reclassify or revalue the claim  
18 if the collateral depreciated. See also, In re Holt, 136 B.R. 260  
19 (Bankr. D. Idaho 1992)(return of vehicle not an allowed modification)

20 Another line of cases holds that a plan may be modified to  
21 provide for surrender in full satisfaction of a secured claim. See Bank  
22 One NA v. Leuellen, 322 B.R. 648 (S.D.Ind. 2005)(modification allowed if  
23 the statutory requirements of § 1325(a) are complied with); In re Ward,  
24 348 B.R. 545 (Bankr. D. Idaho 2005)(modification allowable). Debtor  
25 argues that the Court should adopt this second line of cases, and  
26 especially the reasoning in In re Berendt, Case 07-35054-elp13 (Bankr.

1 D.Or. 9/22/08), an unpublished letter opinion originating within this  
2 district. The Berendt decision is well-reasoned and cites the Bank One  
3 NA v. Leuellen opinion, cited above, as particularly persuasive. The  
4 Bankruptcy Court held in Berendt that there was no impediment to  
5 modification of a confirmed chapter 13 plan to provide for surrender of  
6 collateral in full satisfaction of a secured claim. The Court agreed  
7 with those courts which hold that the "creditor's interests are protected  
8 at initial confirmation by the requirement of adequate protection and at  
9 modification by the bankruptcy court's discretion to deny confirmation if  
10 the debtors have acted in other than good faith with regard to the  
11 collateral."

12 "In the Ninth Circuit, good faith requires an analysis of the  
13 totality of the circumstances and an inquiry into whether debtors have  
14 misrepresented facts, unfairly manipulated the Code, or otherwise made  
15 their proposals in an inequitable manner." In re Ward 348 B.R. at 551  
16 (citing Goeb v. Heid (In re Goeb), 675 F.2d 1386 (9th Cir. 1982)). The  
17 circumstances of this case with respect to Capital Financial's collateral  
18 require a finding that the modified plan was not proposed in good faith.

19 At the time the initial Plan was confirmed, Capital Financial  
20 acquiesced to the Plan as amended in the Order Confirming Plan (entered  
21 November 13, 2007): a secured claim in the amount of \$11,735, post-  
22 confirmation interest at 9%, and monthly payments of \$100 for the first  
23 24 months and \$400 per month thereafter (payment later amended to \$100  
24 and increasing to all available funds after payment of attorney fees).  
25 Approximately 2 ½ years later, after allowing the vehicle to suffer  
26 sufficient damage to reduce its wholesale value to \$500 and allowing her

1 insurance to lapse, Debtor proposes to surrender the vehicle to the  
2 creditor in full satisfaction of creditor's secured claim. To the extent  
3 that a creditor can be said to be responsible at initial confirmation for  
4 the protection of its interest in the collateral by insisting on  
5 sufficient adequate protection payments, a creditor is not, and should  
6 not be, responsible for uncompensated destruction of its collateral  
7 beyond that which could be expected and planned for at initial  
8 confirmation.

### III. CONCLUSION

10 A post-confirmation modified plan filed under § 1329 must  
11 comply with the requirements of § 1325(a), including subsection (a)(3)  
12 which requires that the plan be proposed in good faith. Under the  
13 totality of the circumstances described herein, the Court finds that the  
14 modified plan was not proposed in good faith and confirmation of the  
15 modified plan must be denied. The Court will enter an order to that  
16 effect.



FRANK R. ALLEY, III  
Bankruptcy Judge